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No. 88-300

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, NEAL KNOX, WILLIAM B. BINSWANGER, WARREN CASSIDY, THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND, and MICHAEL K. McCABE,

Petitioners,

v.

MINNESOTA STATE ETHICAL PRACTICES BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
MARTHA J. CASSERLY*
Special Assistant
Attorney General
* *Counsel of Record*
515 Transportation Building
John Ireland Boulevard
Saint Paul, Minnesota 55155
Telephone: (612) 296-6839
Counsel for Respondent

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED FOR REVIEW

Whether a district court judgment may withstand a Rule 60(b)(4) motion even though jurisdiction may be lacking provided there was an arguable basis for the exercise of jurisdiction and not a total want of jurisdiction?

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Respondent Minnesota State Ethical Practices Board respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit Court of Appeal's decision in this case. The opinion and that of the district court are reproduced in Petitioner's Appendix B and C.

STATEMENT OF THE CASE

The procedural history of the litigation of this lawsuit is protracted and repetitive. The petitioners, the National Rifle Association, et al., (hereinafter collectively referred to as "NRA") have removed and appealed this lawsuit continuously through the federal court system over the past six years.

In fact, this current petition is the second time NRA has filed a petition for writ of certiorari in this case before the United States Supreme Court. The first time NRA filed a petition for a writ of certiorari in this case, one of its arguments was lack of subject matter jurisdiction. This is now the sole argument of this petition. NRA's previous argument of lack of subject matter jurisdiction from NRA's first petition to this Court is reproduced in State's Appendix A. This Court denied NRA's first petition for writ of certiorari. *Minnesota State Ethical Practices Board v. National Rifle Association*, 761 F.2d 509 (8th Cir. 1985), 474 U.S. 1082 (1986). State's Appendix B.

This lawsuit started six years ago when the respondent, Minnesota State Ethical Practices Board (hereinafter "State") filed the present action in state court, alleging that the NRA had violated the Minnesota Ethics in Government Act, Minn. Stat. ch. 10A, by failing to register as a lobbyist and as a political fund in conducting its lobbying and political activities. NRA filed a removal petition, arguing that federal question jurisdiction existed because the state statute was preempted by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455, and because the suit threatened to deprive NRA of its first amendment rights. Although the State initially moved to remand the case to state court, contending that no subject matter jurisdiction existed, the State withdrew

its motion to remand and the present matter remained in federal court.

On May 2, 1984, after a trial the federal district court entered judgment for the State and issued an injunction requiring NRA to comply with the state statutes. NRA sought a stay of the district court's decision. The stay request was denied. The Eighth Circuit Court of Appeals also denied the motion for a stay and this Court denied NRA's application for a stay of mandate. Eventually, NRA complied with the district court's order in December 1984 by filing the names, addresses, and occupations of all the contributors who gave more than $50 to the NRA during the relevant time period.

NRA appealed the merits of the district court's decision to the Eighth Circuit Court of Appeals, but did not raise the issue of subject matter jurisdiction at that time. Following briefing and oral argument, the Eighth Circuit affirmed the district court's decision, rejecting NRA's constitutional challenge to the statute. *Minnesota State Ethical Practices Board v. National Rifle Association*, 761 F.2d 509 (8th Cir. 1985). NRA's petition for rehearing *en banc* before the Eighth Circuit was also denied. NRA then sought a writ of certiorari from this Court, arguing both the merits and, for the first time, lack of federal subject matter jurisdiction. Certiorari was denied by this Court. *Minnesota State Ethical Practices Board v. National Rifle Association*, 474 U.S. 1082 (1986).

Undaunted, NRA then returned to the Eighth Circuit Court of Appeals, petitioning for a revocation of its mandate. The sole basis for this motion was the lack of federal subject matter jurisdiction. The Court of Appeals denied the motion. NRA then returned to the district court, moving to vacate judgment and remand to the state court pursuant to Fed. R. Civ. P. 60(b)(4) due to lack of subject matter jurisdiction. The dis-

trict court denied the motion. Petitioner's Appendix C. NRA then resumed its trek back up the federal court appellate system by appealing the district court's denial of its motion to the Eighth Circuit. On February 8, 1988, the Court of Appeals affirmed the district court's decision without opinion. Petitioner's Appendix B. NRA's Petition for Rehearing with Suggestion for Rehearing *En Banc* was also denied. Petitioner's Appendix A. On August 18, 1988, NRA petitioned this Court for a writ of certiorari.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because the challenged court decision does not conflict with prior Supreme Court precedent or decisions of other courts of appeals.

I. The Challenged Decision Is Valid And Correct.

Although NRA cloaks its argument in its petition as a conflict between the circuits and this Court, in reality, NRA is challenging the correctness of the standard articulated by the Eighth and Second Circuits. This Court's exercise of its certiorari jurisdiction depends on numerous factors other than the perceived correctness of the decision below. *Ross v. Moffitt*, 417 U.S. 600, 615 (1974).

NRA is challenging the standard developed by the courts for setting aside a final judgment for lack of subject matter jurisdiction under Fed. R. Civ. P. 60(b)(4). In support for its challenge, NRA cites several of this Court's decisions including *Insurance Corporation of Ireland v. Compaignie des Bauxites*, 456 U.S. 694 (1982) and *Franchise Tax Board*

v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), quoting the strict language on the limitation on federal jurisdiction.

The State does not disagree that the federal courts are of limited jurisdiction. The State agrees that, if there is an error in the exercise of subject matter jurisdiction, the decision should be reversed on direct appeal.

However, a final judgment makes a difference. It marks a formal point at which considerations of economy, certainty, reliance and comity become compelling.

In the present case, there is indisputably a final decision of the case on the merits. NRA had the opportunity to raise its challenge of lack of subject matter jurisdiction on direct appeal. In fact, it did raise the issue on direct appeal to this Court. State's Appendix A. NRA glosses over the fact that the decision is final in the present case and cites decisions which dealt with jurisdictional challenges on *direct appeal.* Banking on cases which overturn decisions for lack of subject matter jurisdiction on *direct appeal* is unpersuasive because the concern for finality of judgment is absent in those cases. In its petition, NRA ignores the concern of finality of judgments, which is a pre-eminent component in evaluating its challenge of jurisdiction pursuant to rule 60(b)(4).

Under a rule 60(b)(4) motion, the concept of a void judgment, in the interest of finality, is narrowly construed. 7 *Moore's Federal Practice* ¶ 60.25[2], p. 225 (1987). Consequently, under a rule 60(b)(4) motion to set aside a judgment as void for lack of subject matter jurisdiction, the courts must balance the judicial concerns of the limits on federal jurisdiction against concerns for finality of judgments. Competing policies are at stake in setting aside a federal court judgment as void for lack of subject matter jurisdiction:

observation of the limits on federal jurisdiction and need for judgments that are final. *Kansas City Southern Railway Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 826 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 955 (1980).

To reconcile these two fundamental yet competing concerns under a rule 60(b)(4) motion for lack of subject matter jurisdiction, the circuit courts established a dichotomy between an "error in the exercise of jurisdiction" from a "total want of jurisdiction":

> Absence of subject matter jurisdiction *may*, in certain cases, render a judgment void. However, this occurs only where there is a plain usurpation of power, when a court wrongly extends its jurisdiction beyond the scope of its authority. Stated another way, such plain usurpation of power occurs when there is a "total want of jurisdiction" as distinguished from "an error in the exercise of jurisdiction."

Kansas City Southern Railway Co. Great Lakes Carbon Corp., 624 F.2d 822, 825 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 955 (1980) (citations omitted).

An erroneous assumption of subject matter jurisdiction is therefore not the equivalent to a "total want of jurisdiction," rendering a judgment void under rule 60(b)(4). *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984).

The lower court in this decision also relied on the Second Circuit Court decision of *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) which held that:

> Since a court has the power to determine its own jurisdiction and, in fact, is required to exercise that power *sua sponte*, it does not plainly usurp jurisdiction when it merely commits an error in the exercise of that

> power. Rather, a Court will be deemed to have plainly usurped jurisdiction only when there is a "total want of jurisdiction" and no arguable basis on which it could have rested a finding that it had jurisdiction.

Nemaizer, 793 F.2d at 65. Consequently, there is a dichotomy between an "error in the exercise of jurisdiction" which is subject to reversal on direct appeal, but not subject to rule 60(b)(4) relief, from a "total want of jurisdiction" and "no arguable basis for a finding of jurisdiction" which are subject to rule 60(b)(4) relief.

In the present case, the Court correctly applied this principle, holding that the basis for NRA's removal, although perhaps erroneous, presented an arguable basis for a finding of federal jurisdiction. NRA had removed the State case to federal court on two grounds: federal preemption and the threat posed by the State's lawsuit to NRA's 1st amendment rights. The State's complaint charged that the NRA, through its political fund, contributed $4,950 to another political committee, a local Minnesota gun owners group. That contribution, NRA argued, was expressly authorized under the Federal Election Campaign Act, 2 U.S.C. § 441a(a)(2)(C), which permits a political fund such as NRA's to contribute up to $5,000 to another political committee. Therefore, according to NRA, the State's action was an attempt to interfere with activity expressly permitted by federal law.

In regard to the constitutional challenge, the State's complaint itself charged that the first and fourteenth amendment rights of NRA under the United States Constitution were not impermissibly abridged by application of the Minnesota statute requiring lobbyist and political fund registration. In other words, the plaintiff's complaint itself, NRA argued, raised

federal constitutional issues. The State has argued, and the courts have agreed, that while it may have been an error to exercise federal jurisdiction, there was an arguable basis for that finding and therefore no "total want of jurisdiction." [1]

In summary, there is a well-established and well-grounded dichotomy between an error in the exercise of jurisdiction, which is subject to reversal on direct appeal but not subject to relief under rule 60(b)(4); and a total want of jurisdiction or no arguable basis for a finding of jurisdiction, which is subject to relief under rule 60(b)(4). In the present case, while there may have been an error in the exercise of jurisdiction, there was no "total want of jurisdiction," rendering the judgment void.

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[1] The State takes strong exception to NRA's contention that the question of whether it is arguable federal law preempted state law is "moot" since the State does not contend federal law preempted state law. NRA's Petition, page 7, footnote 3. Obviously, the question is not moot since both the district court and court of appeals found that there was an arguable basis for a finding of federal subject matter jurisdiction and NRA is now appealing that decision. Jurisdiction to determine jurisdiction is not defeated by a subsequent determination that a court did not have subject matter jurisdiction. In other words, the fact that the opposing party argues, and the court holds, that the federal law did not preempt state law does not mean the removal was improper. Such a holding would mean that every time the underlying basis for the removal was not upheld on the merits, the floodgates would open with the loser moving to vacate the judgment as void. NRA refuses to recognize the procedural posture of the present case: we are no longer on direct appeal. Final judgment has been entered against NRA and the issues, including subject matter jurisdiction, have been litigated through the United States Supreme Court. Consequently, the standards and the issues in the present matter are wholly different. Pretending we are on direct appeal will not make it happen.

II. There Is No Conflict With This Court's Precedent.

NRA contends that the Eighth Circuit's decision in this case conflicts with this Court's decision of *Insurance Corporation of Ireland v. Compaignie des Bauxites*, 456 U.S. 694 (1982). To justify a grant of certiorari, the conflict must truly be direct and be readily apparent from the lower court's rationale or result. To the contrary, the present decision is harmonious with this Court's precedent.

First, the *Insurance Corporation* decision is not dispositive of the present decision because of the differences in the procedural positions of the jurisdictional challenge. In *Insurance Corporation*, this Court was addressing the jurisdictional challenge on *direct appeal*; the present case is indisputably past direct appeal. Therefore, *Insurance Corporation* is distinguishable because the concern of finality of judgments, which governs here, was not a factor in the *Insurance Corporation* decision.

Furthermore, ironically, the *Insurance Corporation* decision expressly supports the State's position and the court of appeals' decision. In its long quotation of the *Insurance Corporation* decision on page 7 of its petition, NRA omits a key footnote from the decision which states as follows:

> A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question on collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal.

Insurance Corporation, 456 U.S. at 702, n. 9.

Pointedly, this Court has repudiated NRA's present argument in holding that, notwithstanding the strict language

concerning the court's jurisdictional limitations, the limitations are nevertheless subject to concerns of finality.

NRA has responded to this argument claiming that this challenge is not a "collateral attack" because it is between the same parties in the same lawsuit. Therefore, NRA contends that principles of *res judicata* do not apply. Even if the technical rules of preclusion are not strictly applicable, the fundamental rationale behind the rules should apply with equal force to a challenge of a final decision by the same parties later in the same case. Otherwise, what is to prevent the litigants from returning to this Court a third or fourth time with the same argument in the same case?

In *Arizona v. California,* 460 U.S. 605, 619 (1983), this Court held that, even if the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform the Court's decision. As this Court stated in another decision:

> The predicament in which respondent finds himself is of his own making. We cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata,* conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy.

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401-402 (1981) (quoting *Reed v. Allen,* 286 U.S. 191, 198-199 (1932)).

In summary, the *Insurance Corporation* decision is not dispositive of the present matter, and in fact supports the State's argument that, since NRA had the opportunity to litigate the jurisdictional issue through the full cycle of direct appeals, principles of *res judicata* are applicable.

III. There Is No Square And Irreconcilable Conflict Between The Decisions Of The Courts Of Appeals.

In its petition to this Court, NRA claims that the standard as developed by the Eighth and Second Circuits is at odds with five other circuits. To qualify for the grant of certiorari, there must be a real and embarrassing conflict of opinion and authority between the circuit courts of appeals. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The present petition does not meet this threshold. There is no "true and direct conflict" between the courts of appeals on the issue of setting aside a final judgment for lack of subject matter jurisdiction. In fact, NRA has not cited one court decision which criticizes the standard as incorrect or wrong. Instead, NRA cites mostly early court of appeals' decisions when the articulation of the standard was less developed. Furthermore, most of the circuits cited by NRA as "in conflict" with the present decision have subsequently adopted and utilized the standard NRA is so troubled with. In fact, a review of the circuit decisions confirms the validity of and supports the present decision. A brief examination of each of NRA's cited "contrary" decisions will demonstrate that the alleged conflict is illusory.

The first purported conflicting decision cited by the NRA is the Ninth Circuit decision of *Gould v. Mutual Life Insurance Company of New York*, 790 F.2d 769 (9th Cir.), *cert. denied*, —— U.S. ——, 107 S. Ct. 580 (1986). The *Gould* decision is inapposite to the dispute of the standard in the present petition. The *Gould* decision does not rest on the dichotomy between a total want of jurisdiction and an error in the exercise of jurisdiction. Rather, the Court relied on a different principle—the law of the case doctrine—in holding that, despite

the lack of subject matter jurisdiction, the decision was not void under a rule 60(b)(4) motion.[2] Furthermore, the Ninth Circuit has in fact adopted the challenged principle that an error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction and does not render the judgment a complete nullity. *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984). Consequently, the Ninth Circuit supports the decision below.[3]

The second purported conflicting circuit, according to NRA, is the Sixth Circuit citing the decision of *Jordon v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). However, as NRA admits in its petition, the *Jordon* decision was premised on the specific constitutional limitation

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[2] Ironically, the State has been citing the *Gould* decision in support of its position that the NRA's motion to vacate is barred, if not by *res judicata*, then by the doctrine of the law of the case. In *Gould*, the Court held that it previously considered, albeit on a petition for rehearing with suggestion for rehearing *en banc*, whether the district court lacked subject matter jurisdiction and rejected the contention. *Gould*, 790 F.2d at 775. In the present case, NRA's motion is similarly precluded by the law of the case doctrine. Two years ago, after the Supreme Court denied certiorari, NRA moved the Eighth Circuit to recall mandate and vacate judgment on the sole basis of lack of subject matter jurisdiction. The Eighth Circuit denied NRA's jurisdisdictional challenge. In addition, this Court denied NRA's jurisdictional challenge in its denial of the petition for writ of certiorari. *Minnesota State Ethical Practices Board v. National Rifle Association*, 474 U.S. 1082 (1986). Consequently, the *Gould* decision is in fact supportive of the State's position that NRA is precluded from moving to vacate the judgment.

[3] NRA raises a non-issue in its discussion of the appellate court's review of subject matter jurisdiction as "reviewable *de novo*." NRA's Petition, page 8. The State does not dispute the contention that, if the judgment is void, the district judge has no discretion in determining whether to vacate it. *Jones v. Giles*, 741 F.2d 245, 247 (9th Cir. 1984). However, the threshold question is whether or not the judgment is void. That standard and determination is in dispute in this petition. The State does not disagree that once a court has found that a judgment is void, it has no discretion whether to vacate it.

of the eleventh amendment prohibiting the award of attorney fees against unconsenting states. In any event, the Sixth Circuit has subsequently adopted and applied the principle that a "total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction . . . and an error in that determination will not render the judgment void." *Hooks v. Hooks*, 771 F.2d 935, 949 (6th Cir. 1985). Plainly, there is no conflict with the present decision.

NRA also fabricates a conflict with the First Circuit, citing the decision of *Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982). To the contrary, the First Circuit in *Honneus* held that the concept of a void judgment is narrowly construed and that, despite the erroneous assumption of jurisdiction, which would be subject to reversal on direct appeal, the judgment was not void precluding rule 60(b)(4) relief. *Honneus*, 691 F.2d at 2. Thus, the point of the case is exactly the same as the present decision: despite an erroneous exercise of jurisdiction, the Court would not grant rule 60(b)(4) relief.[4]

Fourth, NRA claims the Seventh Circuit "also has not adopted—and would find repugnant—the principle adopted by the Eighth and Second Circuits." NRA's Petition, page 11. To the contrary, the Seventh Circuit has, in fact, adopted the standard. For example, in *United States v. Zima*, 766 F.2d 1153 (7th Cir. 1985), the Court stated that because the appeal was from the denial of a rule 60(b)(4) motion to vacate on the grounds of lack of jurisdiction, the concept of void judgments is given a very restrictive interpretation and

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[4] After citing the *Honneus* case in support of its petition, NRA then attempts to distinguish the case by claiming that the error was "only an assumption of *diversity*, not subject-matter, jurisdiction." NRA's Petition, page 10, footnote 5. Unequivocally, diversity is one kind of subject matter jurisdiction and thus germane to the present dispute. For the response to NRA's argument about the discretion to grant the motion, see discussion in footnote 3.

is narrowly drawn in the interest of finality. *Zima*, 766 F.2d at 1159. Accordingly, the Seventh Circuit held, a total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction. *Zima*, 766 F.2d at 1159. This is precisely the point in the present case. In regard to the allegedly conflicting decision in the Seventh Circuit, *Ben Sager Chemicals International v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977), the Court did not address in that case the dichotomy of whether there was a total want of jurisdiction in contrast to an error in the exercise of jurisdiction. Rather, the Court simply held that, despite the improper removal, the judgment was not subject to relief under rule 60(b)(4). *Ben Sager*, 560 F.2d at 812. Again, there is no conflict with the present case.

Finally, NRA cites the District of Columbia decision of *Potomac Passengers Association v. Chesapeake and Ohio Railway Co.*, 520 F.2d 91 (D.C. Cir. 1975) as conflicting with the present decision. This District of Columbia decision is irrelevant to the present dispute. The *Potomac* decision was not a rule 60(b)(4) challenge. Rather, the Court was reviewing subject matter jurisdiction on direct appeal of the decision on the merits. Thus, the strict jurisdictional limits applied in the *Potomac* decision were not tempered by the concerns of finality of judgment. Accordingly, the District of Columbia Circuit decision has no bearing on the validity of the principle applied in the present case.

In summary, a review of the allegedly conflicting decisions in fact establishes that the other circuits have adopted the same standard for a rule 60(b)(4) challenge of subject matter jurisdiction as in this case. Plainly, there is no conflict between the circuits, accordingly, there is no reason for this Court to grant discretionary review of this case.

IV. This Case Is Not An Appropriate Case To Grant Certiorari.

This case is unworthy of the Court's attention. This Court is not a forum for the correction of errors. *Boag v. MacDougall*, 454 U.S. 364, 367-368 (Rehnquist, J., Dissenting) (1982). Granting certiorari in this case would at the most be a correction of an error.

This case is particularly not an appropriate case for certiorari because the injury to NRA, if any, is an entirely self-inflicted strategic error. This case was originally filed by the State in the Minnesota state courts. NRA removed the matter to federal court. After having lost several rounds in federal courts, NRA is now requesting that the scarce resources of this Court be expended to correct an alleged, private and technical error.

Furthermore, this Court should not have to expend any more judicial time again considering the same argument by the same party in the same lawsuit. NRA already petitioned for a writ of certiorari on this case three years ago and raised the same argument it is raising now—lack of subject matter jurisdiction. For the familiar argument, see State's Appendix A. This Court denied NRA's petition then and it should do so now. The substantial case load of this Court is onerous without the litigants returning to this court with the same case and raising the same arguments. This duplicative petition for writ of certiorari should be promptly denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by the Petitioner National Rifle Association, et al., should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
MARTHA J. CASSERLY
Special Assistant
Attorney General
515 Transportation Building
John Ireland Boulevard
Saint Paul, Minnesota 55155
Telephone: (612) 296-6839
Attorneys for Minnesota
State Ethical Practices Board

APPENDIX

APPENDIX A

Portion of NRA's 1985 Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT DID NOT HAVE SUBJECT-MATTER JURISDICTION.

Subsequent to the determination of the District Court that it had subject matter jurisdiction in the instant case, this Court decided *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841 (1983). In that case, this Court determined the circumstances under which a federal district court had jurisdiction over a civil action removed from a state court pursuant to 28 U.S.C. 1441, holding that:

> Congress has given the lower federal courts jurisdiction to hear . . . only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. 463 U.S. at 27-28, 103 S.Ct. at 2856.

In the instant case, the complaint, initially filed in state court, alleged that the NRA had violated Minnesota law. The complaint was filed pursuant to *Minn. Stat.* 10A.34 which expressly authorizes such complaints and creates subject-matter jurisdiction for such complaints in the Ramsey County, Minnesota District Court. The complaint, while noting that NRA might raise the First and Fourteenth Amendments to the U.S. Constitution as a defense (Complaint ¶ 14), did not, however, establish "that its right to relief under [Minnesota]

law requires resolution of a substantial question of federal law in dispute between the parties." 463 U.S. at 13, 103 S.Ct. at 2848.

Franchise Tax Board also held that:

> a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. 463 U.S. at 14, 103 S.Ct. at 2848.

In the instant case, two federal defenses were raised: 1) preemption by the Federal Election Campaign Act, as amended, 2 U.S.C. 431 *et seq.*, as to the count of the complaint relating to the $4,950 contribution by the NRA-PVF to the MGO-PVF[3] and 2) the guarantees of the First and Fourteenth Amendments as to the counts of the complaint relating to "lobbying" reporting and registration and as to the counts relating to the determination that NRA was a "political fund."

As can be seen from the complaint, the latter federal defenses were anticipated by the MEPB. Moreover, as is plain from the Court of Appeals decision, the parties effectively agreed that the applicability of the First and Fourteenth Amendments was the only question truly at issue in the case. As a consequence, this case falls squarely into the principles expressed by *Franchise Tax Board*, thereby mandating the conclusion that the District Court herein plainly lacked subject-matter jurisdiction and that the MEPB's motion to remand should have been granted.

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[3] As noted in footnote 2, *supra*, NRA-PVF complied with the District Court's order regarding reporting and did not appeal that order to the Court of Appeals.

A discussion of the applicability of *Franchise Tax Board* to the instant case is not complete without noting that two factors distinguish the instant case from *Franchise Tax Board*. First, in *Franchise Tax Board*, the plaintiff, after having been denied remand to the state court in which it had initially filed its complaint, raised the issue of subject-matter jurisdiction in the Court of Appeals when the defendent appealed after having lost on the merits. The plaintiff also renewed its argument that the District Court lacked subject matter jurisdiction when it petitioned the Court of Appeals for rehearing. 463 U.S. at 7, 103 S.Ct. at 2845. By contrast, in the instant case, while the plaintiff (MEPB) moved the District Court to remand the case to state court, it did not appeal the District Court's denial of the motion to remand nor did it raise that issue of subject-matter jurisdiction when the defendant (NRA) petitioned the Court of Appeals for rehearing.

Second, it is not MEPB (the plaintiff herein), as it was in *Franchise Tax Board*, who is raising the question of lack of subject matter jurisdiction; rather, it is NRA—upon whose motion the case was removed to federal court—who now raises lack of subject-matter jurisdiction.

Neither factor, however, should cause this Court to hesitate to hold that the District Court in the instant lacked subject-matter jurisdiction. It is well-settled that the jurisdiction of the lower federal courts is "limited to those subjects encompassed within a statutory grant of jurisdiction." *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 701 (1982). Consequently,

> *no* action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant (citation omitted), principles of

> estoppel do not apply (citation omitted), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. (emphasis added) Id. at 702.

By not challenging jurisdiction in the Court of Appeals, MEPB, in effect, consented to the jurisdiction of the federal courts; such consent, however, did not give the Court of Appeals jurisdiction. Moreover, the fact that NRA was the party which initiated the removal to the District Court from the state court does not now prevent it from challenging jurisdiction at this point in the proceedings, both because "principles of estoppel do not apply" to questions of subject-matter jurisdiction and because, if NRA was prevented from challenging subject-matter jurisdiction at this stage in the proceedings, it would be tantamount to allowing the parties to agree to confer subject-matter jurisdiction.

Accordingly, to comply with the principles expressed in *Franchise Tax Board* and *Insurance Corp.*, this Court should, as it did in *Franchise Tax Board*, "vacate the judgment of the Court of Appeals and remand so that this case may be remanded to the" (463 U.S. at 28, 103 S.Ct. at 2856) District Court for Ramsey County.

APPENDIX B

NATIONAL RIFLE ASSOCIATION OF AMERICA, et al., petitioners, v. MINNESOTA STATE ETHICAL PRACTICES BOARD. No. 85-824.

Case below, 761 F.2d 509.

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Jan. 21, 1986. Denied.